No. 79-1977

IN THE

# Supreme Court of the United States

**October Term, 1980.**

FREDERICO RODRIGUEZ,

*Petitioner,*

*against*

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

*Respondent.*

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LUIS PEREZ,

*Petitioner,*

*against*

ARYA NATIONAL SHIPPING LINE, LTD.,

*Respondent.*

---

SRECKO BARULEC,

*Petitioner,*

*against*

OVE SKOU, R. A.,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## JOINT APPENDIX.

MORRIS CIZNER
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(Names of Attorneys continued on inside of cover.)

PETITION FOR CERTIORARI FILED JUNE 16, 1980
CERTIORARI GRANTED OCTOBER 6, 1980.

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Opinion of Hon. Robert K. Carter, U.S.D.J., dated September 12, 1978, is printed in the Supplemental Appendix to Petition as Appendix E at pages 1e to 39e.

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The Decision of the United States Court of Appeals, Fourth Circuit, is printed in the Petition for Writ of Certiorari as Appendix A at pages 1a to 12a.

The Decision of the United States Court of Appeals, Second Circuit, is printed in the Petition for Writ of Certiorari as Appendix B at pages 1b to 14b.

# 79-7632

## United States Court of Appeals

FOR THE SECOND CIRCUIT

LUIS PEREZ,

*Plaintiff-Appellant,*

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## JOINT APPENDIX

ZIMMERMAN & ZIMMERMAN,
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160 Broadway
New York, N.Y. 10038
(212) 227-1350

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DOCKET ENTRIES (Pages 5a to 6a.)

| Date | NR. | Proceedings |
|---|---|---|
| 7-16-76 | 2 | Filed Summons and marshals ret. Served: Arya Nat'l Shipping Line Ltd. % Norton Lilly & Co., Inc. on 7-12-76. |
| 12-2-76 | 3 | Filed defts interrogs. |
| 12-2-76 | 4 | Filed ANSWER ( W&C) |
| 12-2-76 | 5 | Filed notice of deposition of pltff on 1-13-77 at 2PM |
| 4-29-77 | 6 | Filed answers to interrogs.. |
| 5-2-77 | 7 | Filed notice of deposition of J. Costello on 5-27-77 at 2:30PM. Issued summons. |
| 5-4-77 | 8 | Filed deft supplemental interrogs. |
| 7-7-77 | 9 | Filed Pltffs. Supplemental Answers to interrogs. |
| 7-12-77 | 10 | Filed Pre Trial Order.....So Ordered Lasker J. (Consented to) |
| 11-14-78 | 11 | Fld dfts. Memo. of Law. |
| 11-14-78 | 12 | Fld defts. Affdvt. by Joseph T. Stearns in support of a motion for order pur to 12 & 56 FRCP. |
| 11-27-78 | 13 | Fld affdvt. by Martin Lassoff in opposition to dfts. motion, |
| 11-29-78 | 14 | Fld pltffs. Brief in opposition. |

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| Date | NR. | Proceedings |
|---|---|---|
| 12-11-78 | 15 | Fld reply Memo. of dft. in support of the motion to dismiss by virtue of section 933(b) of the Longshoremen's & Harbor Workers' compensation act. |
| 4-13-79 | 16 | Filed Dfts. Notice of New Location for attys. |
| 4-17-79 | 17 | Filed Opinion #48466. dfts. motion to dismiss action denied, without prejudice to renewal after 40 days. So Ordered Lasker J. (mn) |
| 7-3-79 | 18 | Filed Dfts. Notice of Motion for an order pur to rule 56FRCP for summary judgment dismissing pltffs. complaint. Ret. 7/13/79. wc |
| 8-13-79 | - | Filed Memo Endorsed on deft's motion for summary judgment. Motion for summary judgment dismissing this action is granted... Lasker, J. m/n |
| 8-15-79 | 19 | Filed Judgment. ORDERED, ADJUDGED, and DECREED; That the complaint be and it is hereby dismissed... Clerk, J. |
| 9-4-79 | 20 | Filed Pltffs Notice of appeal from endorsement dtd. 8-10-79 & opinion dtd. 4-17-79. (mailed notice to walker & Corsa , 25 Broad St NYC 10004) |
| 9-11-79 | 21 | Fld Certification of Record to the USCA. |

OPINION OF Hon. Morris E. Lasker.

(Printed in the Supplemental Appendix
to Petition as Appendix F at
pages 1f to 14f.)

# 79-7132

## United States Court of Appeals

FOR THE SECOND CIRCUIT

FREDERICO RODRIGUEZ,

*Plaintiff-Appellant,*

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## JOINT APPENDIX

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DOCKET ENTRIES (Pages 11a to 13a.)

RODRIGUEZ -v- COMPASS SHIPPING CO.
JUDGE CARTER 77 civ 3378

| Date | NR. | Proceedings |
|---|---|---|
| 07-12-77 | 1. | Filed Complt. & Iss. Summs. |
| 08-02-77 | 2. | Filed Summs with marshal's return: Djakarta Lloyd P.N. J. Bridgeweld 07-19-77 |
| 08-05-77 | 3. | Filed Deft's answer. wc |
| 02-17-78 | --- | |
| 02-23-78 | 4. | Filed Pre-trial Schedule Order... Carter, J. |
| 04-21-78 | 5. | Filed deft's Motion for an order for summary judgment, etc...Ret: 5-5-78-10-am. |
| 04-21-78 | 6. | Filed deft's memo of law in support of motion for summary judgment. |
| 04-24-78 | 7. | Filed Pltffs. Motion for an order modifying the prel. inj. dtd 4-14-78. Ret: 5-5-78 9:30 am. |
| 05-10-78 | 8. | Filed defts' Pre-trial memorandum. |
| 05-19-78 | 9. | Filed Pltff's affdvt in opposition to defts' motion for summary judgment. |
| 05-23-78 | 10. | Filed Defts' reply affdvt in further support of their motion to dismiss. |

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| DATE | NR. | Proceedings |
|---|---|---|
| 06-02-78 | 11. | Filed Pre-trial Memo of defts. |
| 09-13-78 | 12. | Filed Opinion # 47598= Conclusion: The motion for summary judgment is denied. The Motion to dismiss based on an earlier order of dismissal of Judge Bonsal is also denied. Decision on the motion to dismiss based on 33 USC 933 is reserved, pending discovery to be completed within 60 days of this opinion. It is so ordered...Carter, J. m/n |
| 11-27-78 | 13. | Filed Pltff's affdvt. |
| 11-29-78 | 14. | Filed Pltff's brief in opposition to deft's motion. |
| 12-07-78 | 15. | Filed Deft's Affdvt in connection with the settling of a proposed order etc... |
| 12-08-78 | 16. | Filed Order that the motion to dismiss the case for failure to commence suit with 6 months of an award of compensation is granted and the complt. is dismissed with prej. and with costs to defts...Carter, J. dtd 12-6-78. |
| 12-18-78 | 17 | Filed Pltff's Notice of Motion for an order vacating the order of dismissal dtd 12-8-78. Ret: no date. |
| 12-18-78 | 18. | Filed Memorandum in support of pltff's motion for reargument. |

| Date | NR. | Proceedings |
|---|---|---|
| 01-15-79 | 19. | Filed deft's memorandum in opposition to pltff's motion for reargument. |
| 01-18-79 | | Filed Memo-end on Notice of Motion dtd 12-18-78 = Motion to vacate judgment and for a rehearing denied. So Ordered. Carter, J. dtd 1-18-79 m/n |
| 02-15-79 | 20. | Filed Notice of Appeal to the U.S.C.A. by Frederico Rodriguez from the order of dismissal dtd 12-6-78 and order dtd 1-17-79 m/n to Walker & Corsa. |

COMPLAINT (Pages 14a to 22a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING).

Plaintiff demands a trial by jury.

Plaintiff, complaining of the defendants above-named, by ZIMMERMAN & ZIMMERMAN, his attorneys, respectfully alleges:

I. Upon information and belief, the defendant COMPASS SHIPPING CO., LTD. is a foreign corporation.

II. Upon information and belief, the defendant DJAKARTA LLOYD P.N. is a foreign corporation.

III. Upon information and belief, the defendant COMPASS SHIPPING CO., LTD. does not have its principal place of business in the State of New York.

IV. Upon information and belief, the defendant DJAKARTA LLOYD P.N. does not have its principal place of business in the State of New York.

V. Plaintiff is a citizen and resident of the State of New York.

VI. That the matter in controversy, exclusive of interest and costs, exceeds the sum of TEN THOUSAND ($10,000.00) DOLLARS.

VII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant COMPASS SHIPPING CO., LTD. was the owner of the vessel, the S.S. SOUTH BREEZE.

VIII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant COMPASS SHIPPING CO., LTD. manned said vessel and their Masters, Officers and crew were on board said vessel and in possession of same.

IX. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, COMPASS SHIPPING CO., LTD, managed, operated, maintained and controlled said vessel.

X. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. was the time charterer of the vessel, the S.S. SOUTH BREEZE.

XI. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. was the bareboat charterer of the vessel, the S.S. SOUTH BREEZE.

XII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. manned said vessel and their Master, Officers and Crew were on board said vessel and in possession of same.

XIII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. managed, operated, maintained and controlled said vessel.

XIV. Upon information and belief that at all the times herein after mentioned, the said S.S. SOUTH BREEZE was docked at the 60th Street Pier, Brooklyn, New York and stevedoring work was being performed thereon.

XV. Upon information and belief that at all the times herein mentioned, the said stevedoring work on board said vessel was being performed by INTERNATIONAL TERMINAL OPERATING CO., INC., pursuant to agreement with the defendant COMPASS SHIPPING CO., LTD. or its agents.

XVI. Upon information and belief that at all the times herein mentioned, the said stevedoring work on board said vessel was being performed by INTERNATIONAL TERMINAL OPERATING CO., INC., pursuant to agreement with the defendant DJAKARTA LLOYD P.N. or its agents.

XVII. Upon information and belief that at all the times herein mentioned, said

stevedoring work on board said vessel was being performed under the general supervision and direction of the defendant, COMPASS SHIPPING CO., LTD., its agents, employees, the Master, Officers and Crew of said vessel.

XVIII. Upon information and belief that at all the times herein mentioned, said stevedoring work on board said vessel was being performed under the general supervision and direction of the defendant, DJAKARTA LLOYD P.N., its agents, employees, the Master, Officers and Crew of said vessel.

XIX. That at all the times herein mentioned, plaintiff was employed as a longshoreman by said INTERNATIONAL TERMINAL OPERATING CO., INC., and in the course of the performance of his duties was lawfully on said vessel in Hatch No. 2 thereof.

XX. Upon information and belief that at all the times herein mentioned and

prior thereto, the defendant, COMPASS SHIPPING CO., LTD. maintained said Hatch No. 2 of said vessel herein mentioned.

XXI. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD, P.N. maintained said Hatch No. 2 of said vessel herein mentioned.

XXII Upon information and belief that at all the times herein mentioned and prior thereto, the said Hatch No. 2 of said vessel was a part thereof, and was maintained, supplied and provided by defendants to longshoremen for use in connection with the performance of their stevedoring work on board said vessel.

XXIII. That on or about the 4th day of September, 1973 while plaintiff was lawfully on board said vessel when he was caused to slip and fall and to sustain severe personal injuries.

XXIV. That said accident was caused solely by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel in that they failed to supply plaintiff with a safe place to work; in that they failed to supply suitable, safe, proper and adequate walking and working surfaces; in that they failed to provide sufficient illumination; in that they failed to provide ladders that were safe for use; in that they failed to warn plaintiff thereof; in that they maintained said hatch with hidden traps therein and thereat; in that they breached Strict Liability without Fault; in that they failed to remedy or repair said conditions complained of; in that they failed to avoid said accident although it was foreseeable; in that they permitted said vessel to be, become and remain unsafe and unseaworthy and so maintained same;

in that they breached Federal Safety and Health Regulations; in that they failed to avoid said accident although they had reasonable opportunity to do so and in that they were careless and negligent in other respects.

XXV. That as a result thereof, the plaintiff sustained certain severe personal injuries both internal and external, to divers parts of his arms, head, legs and body and he was made sick, sore, lame and disabled and suffered a severe shock to his nervous system and plaintiff believes that some of the injuries he sustained may remain permanent.

XXVII. That plaintiff was compelled to expend divers sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained and may in the future be compelled to expend further sums of money for such purpose

and plaintiff was, and may in the future, be unable to pursue his usual vocation, to his damage.

XXVIII. That by reason of the premises, the plaintiff has sustained damage in the sum of TWO HUNDRED THOUSAND ($200,000.00) DOLLARS.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of TWO HUNDRED THOUSAND ($200,000.00) DOLLARS, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
Office & P.O. Address
160 Broadway
New York, New York 10038

ANSWER (Pages 23a to 29a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendants, Compass Shipping Co., Ltd. and P.T. Djakarta Lloyd, sued herein as Djakarta Lloyd P.N., answering plaintiff's complaint, states on information and belief as follows:

1. Admit the allegations contained in paragraphs I, II, III, IV, VII, XI and XIV of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs V, XVI and XIX of the complaint.

3. Admit that at the time mentioned in the complaint defendant P.T. Djkarta Lloyd manned M/S SOUTH BREEZE and that her master, officers and crew were aboard the vessel from time to time and in possession of same, but not those parts or portions thereof turned over to longshoremen, steve-

dores or other independent contractors, but except as so specifically admitted herein, deny each and every other allegation contained in paragraph XII of the complaint.

4. Admit that at the time mentioned in the complaint defendant, P.T. Djkarta Lloyd managed, operated, maintained and controlled M/S SOUTH BREEZE, but not those parts or portions thereof, including the No. 2 hatch, turned over to longshoremen, stevedores and other independent contractors for use in connection with the performance of work aboard the vessel, but except as so specifically admitted herein, deny each and every other allegation contained in paragraphs XIII, XXI and XXII of the complaint.

5. Deny each and every allegation contained in paragraphs VI, VIII, IX, X, XV, XVII, XVIII, XX, XXIII, XXIV, XXV, XXVII and XXVIII of the complaint.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELEF AS FOLLOWS:

6. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

7. If plaintiff was injured in the manner and for the reason alleged by him, his injuries were caused and/or brought about in whole or in part by his own negligence or by the negligence of others, including his co-employees, for whose negligence defendant is not liable.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

8. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

9. Upon information and belief payment of compensation pursuant to an award was made to plaintiff under the Longshoremens' & Harbor Worker's Compensation Act more than six months prior to institution of this suit.

10. By virtue of 33 USCA §933(b) "all right" of plaintiff against defendant was assigned to plaintiff's employer or its insurer six months after payment of compensation pursuant to an award and plaintiff is therefore without standing to maintain this action.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

11. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

12. Upon information and belief, as a result of the injuries alleged in this suit plaintiff received compensation benefits under the Longshoremens' and Harbor Worker's Compensation Act from his employer or his employer's insurer and plaintiff is, therefore, not the real party in interest in respect to the portion of the total claim of damages which represents compensation already paid or to be paid to him under any provision of the said Act to which his employer or his employer's

insurer has thereby became subrogated.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

13. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

14. Plaintiff's cause of action is time barred and barred by the Maritime Doctrine of Laches and defendants have been prejudiced thereby.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIFTH AFFIRMATIVE DEFENSE ON BEHALF OF DEFENDANT COMPASS SHIPPING CO., LTD., SAID DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

15. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with

the same force and effect as if herein repeated and set forth at length.

16. Plaintiff brought suit in this honorable court to recover damages for the same alleged injury which is subject to this proceeding. This suit, 76 Civ. 2451 (DBB), as against this defendant was dismissed with prejudice on March 28, 1977 and the within action is not maintainable.

WHEREFORE, defendants demand judgment dismissing the complaint herein, together with costs and disbursements of this action.

Dated: New York, New York
August , 1977

WALKER & CORSA
Attorneys for Defendants

By _____
A Member of the Firm
25 Broad Street
New York, New York 10004

DEFENDANTS' NOTICE OF MOTION (Pages 30a to 31a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of JOSEPH T. STEARNS, duly sworn to the 21st day of April, 1978, the pleadings and all prior proceedings had herein, the undersigned will move this court before the Honorable Robert L. Carter, a judge of this court to whom this case is assigned for all purposes, at the United States Courthouse, Room 2903, on the 5th day of May, 1978, at 10 o'clock in the noon of that day or as soon thereafter as counsel can be heard for the following relief:

1. For an order pursuant to Rule 56 FRCP for summary judgment dismissing plaintiff's complaint;

2. For an order pursuant to Rule 12 FRCP and 33 U.S.C. §933(b) dismissing this case because not brought within six months of an award as required.

3. For such other and further relief as may be just in the premises.

Dated: New York, New York
April 21, 1978

Yours, etc.,

WALKER & CORSA
Attorneys for Defendants

By _____
A Member of the Firm
25 Broad Street
New York, New York 10004

TO: ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

AFFIDAVIT OF JOSEPH T. STEARNS IN SUPPORT
(Pages 32a to 40a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants. I make this affidavit in support of defendants' motion for a dismissal of this complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit and for summary judgment on grounds that plaintiff's claim of liability is deficient as a matter of law.

2. This is a longshoreman's "new act" personal injury case. Plaintiff claims to have been injured on September 4, 1973 while working aboard S.S. SOUTH

BREEZE at Pier 60, Brooklyn, New York as an employee of the contract stevedore, International Terminal Operating Co., Inc. At that time the vessel was owned by defendant, Compass Shipping Company Ltd. and was under bareboat charter to defendant D. Jakarta Lloyd P.N., which employed the officers and crew. Plaintiff has testified by deposition that he was injured at approximately 4:45 p.m. while leaving the vessel's No. 2 hatch by means of a so-called "escape hatch" ladder located at the after end of the No. 2 hatch, and which was affixed to the common bulkhead between hatches 2 and 3. According to plaintiff's testimony (we annex a complete copy of the transcript of plaintiff's deposition as Exhibit "A" to this affidavit) at his pre-trial deposition plaintiff climbed up the straight steel ladder affixed to the common bulkhead between these two

hatches (transcript, p. 13) to the very top of the ladder which led to the masthouse or small enclosure ("little house", p.14) providing a platform for the winches between these two hatches. According to plaintiff's deposition testimony as he reached the top of the ladder he reached out with what he thought was his right hand to secure a handhold affixed, apparently to the masthouse bulkhead (see, pp. 16-17). He then put his right foot firmly on the deck inside the masthouse and swung his left leg out of the opening at the head of the ladder. For reasons which plaintiff could not adequately explain he somehow proceeded to place his left foot in the opening of the escape hatch latter leading to hatch No. 3 which was affixed, of course, to the other side of the common bulkhead, both ladders leading to separate but apparently closely together circular hatchways (pp. 17-28). At his deposition plaintiff could

add absolutely nothing to this description of his accident by way of explanation of why this "accident" had occurred and indeed given an opportunity in his own words (p. 28) to account for his injury in terms other than his exclusive negligence plaintiff stated that he could not do so. Careful reading of this transcript discloses absolutely no basis for plaintiff's claim of negligence of the shipowner or bareboat charterer as causing or contributing in any way to the occurrence of his alleged injuries. To the degree that plaintiff suggested that the accident was the result of the "somewhat dark" lighting conditions in the masthouse, plaintiff also said: that he could see (p. 25), apparently, the opening before he stepped into it; that the arrangement of the openings in the masthouse was familiar to him because the escape hatch openings are similarly arranged on all other ships (p. 19) and

because he had used the same ladder 3 times before that day (p. 30); and, the masthouse door was open, a distance of some foot and a half or two from where his accident occurred (p. 43).

3. The matter in suit was first brought to this court by summons and complaint filed June 2, 1976. Plaintiff's original complaint named the owner of the vessel, Compass Shipping Company Ltd. as the sole defendant. This case was assigned to Judge Dudley B. Bonsal and was docketed with this court as 76 Civ. 2451 (DBB). The pre-trial conferences before Judge Bonsal in that case it was disclosed to the attorneys for plaintiff that although the shipowner had been correctly identified the claim of liability for negligence for acts of the ship's officers and crew would not lie against the owner, since the vessel was under bareboat charter to

D. Jakarta Lloyd P.N. which under terms of the charter was the employer. On the basis of our assumption that plaintiff's complaint was directed towards assertion of personal fault of the shipowner or other persons responsible for the acts of the crew, we informed the court and opposing counsel that, in result, an improper party defendant had been named. The attorney for plaintiff agreed and signed an order of discontinuance subject to confirmation of our representation to plaintiff's attorneys that, indeed, the bareboat charterer not the vessel owner was the employer of the crew at the time of the event in suit. This order provided attorney for plaintiff opportunity within 60 days to apply to the court for relief from the order of discontinuance. Plaintiff's attorney made no such application, but after initially attempting to persuade Judge Bonsal to permit an amendment to

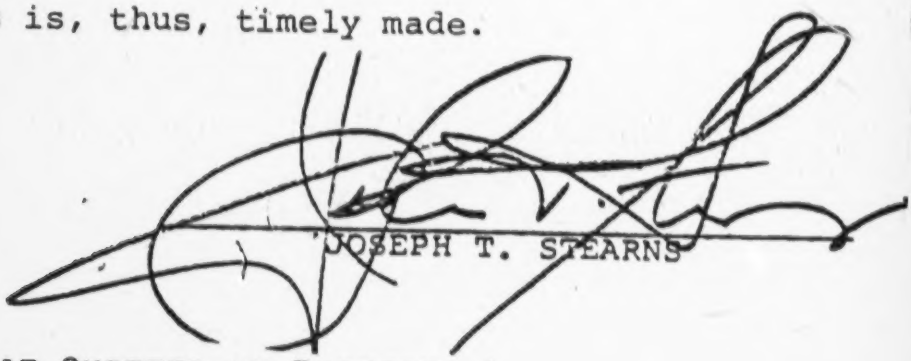
the complaint to add the bareboat charterer as a co-defendant, this suit was instituted and, despite the order of dismissal as against Compass Shipping Company Ltd., vessel owner, this party was again named as a defendant in this subsequent action.

4. This suit was filed July 12, 1977. Plaintiff dismissed case against the shipowner only was begun June 2, 1976. As a result of the claim of injury in suit plaintiff received Workmen's Compensation under the Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.* He was paid $1,090.70 temporary total disability and was, in addition, awarded $2,519,51 for an alleged 5 1/2% permanent partial loss of use of the left leg. Total compensation payable by the employer, exclusive of medical expenses was, $3,610.21 for an "injury" described by the treating doctor as a "contusion

and puncture" wound. Plaintiff's award for scheduled loss of use was issued by order of the compensation board November 4, 1974, a copy of which we annex as Exhibit "C". This suit, and its predecessor, were begun more than six months from the award. This lapse of time without institution of suit causes an assignment of plaintiff's cause of action to his employer, International Terminal Operating Co., Inc. Plaintiff is without claim against the shipowner or charterer by provision of 33 U.S.C. §933(b), as alleged by defendant as its second affirmative defense.

5. By provision of this court's order of February 22, 1978 discovery must be completed by April 21, 1978 at which time this case is scheduled to be added to the court's ready calendar. It is similarly provided that all motions for summary judgment or dismissal of the complaint be filed not later than April 21, 1978.

Thereafter, by provision of the court's order numerous preliminary steps in preparation for trial are required. This motion to dismiss is, thus, timely made.



JOSEPH T. STEARNS

(JURAT OMITTED IN PRINTING.)

EXHIBIT C, ANNEXED TO AFFIDAVIT
(Pages 41a to 42a.)

U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore & Harbor Workers' Compensation Act
1515 Broadway
New York, New York 10036

OWCP # 2-29100

We, the undersigned, having an informal conference, and having received a copy of the signed agreement, in this case on 11/4/74, agree, by the issuance of a Compensation Order, to the following disposition:

(1) Temporary Total Disability Compensation: 9/5/73 to 10/22/73, inclusive 6-6/7 weeks at $159.06 per week, in the amount of $1040.70, less $477.18 previously paid, leaving a balance due of $613.52.

(2) Permanent Partial Disability Compensation: 5½% permanent partial disability of the left leg, 15.84 weeks at $159.06 per week, in the amount of $2519.51.

(3) Total Combined Compensation Payable: $3610.21, less $477.18 previously paid, and

less $510.00 approved fee (to include expenses,) leaving a balance due of $2.623.03.

The employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal compensation order, in accordance with Section 702.315 (a) of the Regulations.

Federico Rodriguez
Claimant

Claimant's representative

Employer's or Carrier's Rep.

Claims Examiner

Temp. NY Conf.-2

AFFIDAVIT OF EDWARD D. LORY IN OPPOSITION
(Pages 43a to 49a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK, COUNTY OF NEW YORK:

EDWARD D. LORY, as and for his Affirmation under penalty of perjury, states as follows:

Affiant is an associate attorney in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys for the plaintiff herein, who, upon plaintiff's file in the within action, makes this Affirmation in Opposition to defendants' motion for summary judgment pursuant to Rule 56 FRCP and in opposition to defendants' application for an order of dismissal pursuant to Rule 12 FRCP and 33 U.S.C. 933(b).

POINT I

Defendants' motion for summary judgment pursuant to Rule 56 FRCP must be denied for the reason that questions of fact remain at issue for determination by a jury.

At the outset it must be recalled that the Congress, with its Amendment to 33 U.S.C. 905(b) (Longshoremen and Harbor Workers' Compensation Act) stated that despite the Congressional elimination of the longshoreman's claim of unseaworthiness, that the shipowner could not assert assumption of risk as a defense.

Defendants' factual recitation recites a premise predicated upon assumption of risk. However, said recitation omits plaintiff's testimony on page 34, lines 8 and 9, that it was "very dark". In addition, defendants, in their moving papers, suggest that all cargo ships have a common arrangement plan with the manhole access to escape hatch ladders for adjacent hatches within one foot of each other. However, assuming defendants' factual recitation arguendo although not here agreed to, and adding the issue as to whether there was or was not sufficient

illumination in the interior of the common deck house between Hatches No. 1 and 2, genuine issues of fact remain for jury determination, namely, whether defendants' vessel with the manhole arrangement described constituted a reasonably safe arrangement for ingress and/or egress into and/or out of the hatch. The foregoing, in addition to the issue of illumination, appeared to be sufficient grounds to deny defendants' motion for summary judgment.

POINT II

With respect to Judge Bonsal's order of dismissal it should be noted that said Order was "without prejudice" so that plaintiff remained at liberty to include defendant, COMPASS SHIPPING COMPANY LTD. as the registered owner of the vessel as a party defendant in plaintiff's action against defendant, D. JAKARTA LLOYD P.N. who is alleged to have had the vessel

under bareboat charter in September, 1973.

POINT III

Pursuant to the cases of Grasso v. Lorentzen, 56 F.Sup. 51 (SDNY 1944) Aff'd 149 F.2d 127, and Potomac Electric Power Co. v. Whynn, 343 F.2d 295, the former decided by CCA 2d and the latter by CADC, defendants' allegation of assignment by operation of law is without merit.

Firstly, 22 U.S.C 933(b) was not designed to protect third parties such as the defendants herein from suit.

Secondly, Exhibit C alleged by the defendant herein to be a "formal order", is in fact not a formal order since it lacks the signature of a Deputy Commissioner. In the Grasso case, Supra, the Bar was told that to meet the requirements of Section 933(b) there must be an affirmative act or determination by the Deputy Commissioner. Exhibit C on its face recites that the parties in interest attended at an informal conference and agreed in writing to dispose of the claim

"without regard to the receipt of a formal compensation order", which order would have been signed by a Deputy Commissioner had it ever issued. That no formal order ever issued is apparent from its absence as an exhibit.

Thirdly, no mention is made that plaintiff's employer (assignee) brought any action to recoup both its lien plus one fifth (1/5) of any recovery obtained, with the balance of such recovery going to the plaintiff. As held in the Potomac Electic Power Co., case, Supra, the plaintiff-employee may bring suit against third party whenever it is evident, as it is here, that the employer-assignee does not intend to bring suit.

Section 933(b) and the Potomac Electric Power Co. case mentioned above, and the cases of Joyner v. F & B Enterprises (CADC 1971) 448 F.2d 1187 and Lindler v. District of Columbia (CADC 1974) 502

F.2d 500, support of Affiant's contentions that the employer's declination to sue a third party amounts to a waiver of the protection offered by statutory assignment and that the injured employee may bring suit against a third party whenever it is evident, as it is here, that the employer-assignee, for whatever reason, does not intend to bring suit.

Affiant submits further that solely plaintiff's employer can assert any rights under 933(b), namely, to bring the action itself and/or to substitute itself as plaintiff in any action brought by the injured employee subsequent to the expiration allowed an injured employee to bring the action himself and that the defendants herein are without privy, without legal standing and are and remain incompetent to raise any issues pursuant to the provisions of 933(b).

WHEREFORE, upon each and all the foregoing, Affiant submits that genuine issues of fact remaining, that defendants' motion for summary judgment pursuant to Rule 56 FRCP should be denied and that defendants' motion for an oral dismissal pursuant to Rule 12 FRCP must also be denied upon the grounds that the defendants herein are incompetent to raise any issues pursuant to the provisions of 933(b).

Dated: New York, New York
May 18, 1978.

Edward D. Lory

REPLY AFFIDAVIT OF J.T. STEARNS
(Pages 50a to 60a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants. I make this affidavit in reply to the affidavit of plaintiff's counsel, Edward Lory, in opposition to defendants' motion for dismissal of plaintiff's complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit, and for summary judgment because plaintiff's claims raise no real issue of defendants' liability.

2. Plaintiff's affidavit erroneously and without any basis asserts the defendants'

factual recitation is predicated upon the doctrine of assumption of risk and then offers the proposition that since the 1972 Amendments to the LHWCA eliminated any defense by the shipowner based on assumption of risk, summary judgment should be denied.

3. Defendants' recitation of facts is based solely upon the testimony of plaintiff at his examination before trial. The defendants' neither implicitly nor impliedly raise the doctrine of assumption of risk as a defense in this action. The testimony was submitted solely for the purpose of giving the court the necessary information relating to plaintiff's claim of alleged negligence on the part of the shipowner so that it can properly determine whether or not summary judgment on the issue of liability is proper in this case.

4. The 1972 Amendments to the LHWCA limited the circumstances under which longshoremen could recover damages from shipowners, declaring that the land based principles of negligence should be applied as a standard of care for vessels boarded by dock workers. However, the principles of negligence applicable in LHWCA actions are not limited necessarily to those relative to the condition and use of land. The amendments abolished the doctrine of unseaworthiness, eliminated the concept of non-delegable duty to provide a safe place to work and relieved shipowners from liability predicated upon the negligence of stevedore companies.

5. This Circuit has added its interpretation to the clear language of the 1972 Act in numerous cases the most recent being Cox v. Flota Mercante Grancolombiana, decided May 10, 1978 (Docket #77-7338) a case this court heard at the trial

level. The application of the law as stated in the Cox case clearly requires the granting of summary judgment dismissing plaintiff's complaint in the present action. Plaintiff's affidavit states that summary judgment should be denied on two grounds: (1) the question of whether or not there was sufficient lighting raises an issue of fact concerning shipowner's negligence that should be determined by a jury; (2) whether the manhole arrangement described constituted a reasonably safe arrangement for ingress and/or egress into and/or out of the hatch should be determined by a jury.

6. The second issue raised in plaintiff's affidavit is without merit and may easily be disposed of by referring to plaintiff's deposition testimony and to the Cox decision. Referring to the trial court's charge relating to the shipowner's duty to provide a safe place to work the Cox court stated: "This charge, in effect, was merely a

reiteration of the pre-1972 law which imposed on the shipowner a non-delegable duty to provide the employee of an independent contractor with a safe place to work. It was exactly this legal principle which Congress intentionally changed." Id. at 12. Whether there is liability because of the manhole arrangement is therefor a question of negligence. There is no warranty of safe egress under the "New Act". This might be a question of fact were it not for plaintiff's testimony that the manhole arrangement was not unusual. A genuine issue of fact is not created by an attorney's argument after the fact that the arrangement must have been unsafe, which is clearly derivative from the fact that the accident occurred. Plaintiff admitted that the arrangement was not unusual and, hence, not unsafe, and no competent offer to prove the contrary has been made. This second issue raised by plaintiff's counsel is without any

support in the law or in the facts before this court, and does not raise any genuine, material issue of fact for purposes of the present motion.

7. The sole remaining issue that plaintiff raised as grounds for the denial of defendants' motion for summary judgment is the question of whether or not the failure of sufficient lighting presents a genuine, material issue of fact upon which the negligence of the shipowner can be predicated.

8. In analyzing the cases in this circuit and others, it is now apparent that a longshoreman's claim against the shipowner should not be permitted when the ship has relinquished control of the operation which led to the injury. Munoz v. Flota Mercante Grandcolombia, S.A., 550 F.2d 142 (3 Cir. 1977), Hickman v. Jugoslavenska Linijska Plovidba Ryika "ZVIR", Docket No. 77-7274 (2 Cir., February

2, 1978), Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2 Cir. 1977). In this case the ultimate issue is not whether there was sufficient light but whether or not the shipowner had a duty to provide means to make the light sufficient as claimed by plaintiff. Defendant, for purposes of argument only, assumes the light was insufficient; however, it vigorously maintains that the light was sufficient, as this court might safely conclude because of the time of day (4:45 p.m.); the time of year (September) and the fact that plaintiff was admittedly within a foot or two of the open masthouse door used moments before by other members of his gang.

9. If there was no duty to provide "sufficient" light, there, of course, can be no basis for a finding of negligence on the part of the shipowner. The Munoz court in dismissing plaintiff's complaint, stated, in part:

> "...It would, in our view, contravene the clear Congressional intent and

> scheme to approve recovery against Grandcolombiana in this case. The shipowner had no duty (emphasis added) to supervise the minute details of work totally entrusted to the competence of the stevedore. Supra at p. 840-841.

10. As stated by the Cox court, the responsibility for the safety of the longshoreman was on the stevedore and it had the responsibility to ensure the pins were in place. Id. at p. 9. In this case, if the light were insufficient, it was the stevedore's responsibility to remedy the situation and not the shipowners. The stevedore alone is further charged with the mandatory requirements of the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918 et seq. Those requirements state (a) All means of access and walkways leading to working areas as well as the working areas themselves shall be adequately illuminated; (e) Employees shall not be permitted to enter dark spaces without a suitable portable light. 29 C.F.R. 1915.52 (a) (e).

11. In this case the discharging operation was entrusted to the stevedore alone and he knew when and where the employees were working and he was responsible for the safety of the longshoreman in the discharging area. As the Cox court concluded: "In view of the overwhelming decisional authority the shipowner had no duty to supervise the operation entrusted to the stevedore alone. Supra, at p. 11.

Finally, even if we were to assume there was a duty owed on the part of the shipowner, the necessary actual notice of the alleged insufficient lighting would have had to be brought to the attention of the shipowner, through its employees, so he could have a reasonable opportunity to remedy the situation. In this context, there is not even any suggestion, much less evidence, that the shipowner was advised of the alleged insufficient lighting and in that respect plaintiff's complaint

also fails as a matter of law. Cox v. Flota Mercante Grancolombiana, supra. See, also Espinoza v. United States Lines, Inc., 444 F. Supp. 405 (S.D.N.Y. 1978).

POINT II

In regard to plaintiff's opposition to dismissal based on 33 U.S.C. §933(b) it is totally invalid to say that defendants' Exhibit "C" does not represent a formal order solely on the basis that it lacks the signature of the Deputy Commissioner. The signed agreement clearly indicates that the undersigned "agree by the issuance of a Compensation Order." The case law in this circuit supports the fact that the agreement reflected in Exhibit "C" is sufficient for purposes of the statute. The second circuit, at least interprets §933(b) literally. See Liberty Mutal Ins. Co. v. United States, 290 F.2d 257 (2 Cir. 1961). Moreover, the formality insisted upon by plaintiff is not required.

See, e.g., Toomey v. Waterman Steamship Corp., 123 F.2d 718 (2 Cir. 1941); Cupo v. Isthmian Steamship Co., 56 F. Supp. 45, 47 (S.D.N.Y. 1941). Indeed, the 1972 Amendments changed §933(b) to add the words "or board" making an order of such as a claims examiner sufficient to trigger the statutory assignment.

JOSEPH T. STEARNS

(Jurat omitted in printing.)

OPINION OF HON. ROBERT L. CARTER.

(Printed in the Supplemental Appendix to Petition as Appendix E at pages 1e to 39e.)

AFFIDAVIT OF EDWARD D. LORY IN OPPOSITION
(Pages 62a to 66a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

State of New York )
ss.:
County of New York )

EDWARD D. LORY, being duly sworn, deposes and says:

That as an associate attorney in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys for the plaintiff herein, he is familiar with the prior proceedings had in the within action.

That he hereafter responds to the Court's invitation for a plaintiff to address himself to the "conflict of interest" issue.

However, before addressing that issue, deponent respectfully states that the Court here erroneously concluded that an order issued upon an agreed settlement between the parties and a formal compensation order are one and the same except as to form. In point of fact where a claim is disposed of by settlement, the

claimant retains his right, without time limitation, to reopen that claim. However, where a claim is disposed of by formal order, then the claimant's time to reopen that claim expires after one year.

Returning to the conflict issue, that very issue was discussed with Mr. Albert P. Cerrachio, an International Terminal Operating Co., Vice President. (ITO was the plaintiff's employer on the date of injury and the potential assignee of his claim pursuant to the Act.) Mr. Cerrachio orally advised deponent that as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of an action against a shipowner and will not in the future bring, maintain and/or assume the prosecution of any action against a shipowner. Mr. Cerrachio, although pressed to do so, declined to make further comment. However, Mr. Cerrachio gave

permission to be quoted as hereinbefore set forth.

Although Mr. Cerrachio did not explain the basis of ITO's policy decision, one need only look to the CCA 2d Opinion in Valentino v. Rickners Rhederee, 522 F.2d 466, 1977 AMC 618 for the universal reason as said reason was reported to the Court by both counsel:

> "That stevedores do not, as a practical matter, pursue these law suits - presumable for fear of antagonizing their - customers."

Therefore, this Court must recognize the practical fact that stevedores are hired only by shipowners and that only a stevedore with a suicidal tendency would sue a shipowner as the assignee of its employee's claim.

Accordingly, it must follow that the employer's assign's interest and the injured employee's interest are at odds rather than mutual for the reason

that stevedores assume compensation exposure and payments as business costs without regard to the rights and expectation of the injured employee with respect to the fruits of a law suit.

Further, therefore, deponent respectfully requests this Court to recognize and accept the conclusion that business practicalities preclude a mutual interest in the assignee employer and the injured employee so that under the premises of the within action the injured plaintiff employee here must helplessly watch his claim for relief languish to the benefit of no one but the alleged defendant tort feasor. Support that this result was never intended by the Congress is apparent since the foregoing result does not compel the shipowner to zealously pursue safety as the Congress intended.

WHEREFORE, deponent respectfully submits that where the business practicalities

of the assignee employer conflict with the interest of the injured employee, that the absence of a common and mutual intended result on the part of the said assignee employer and the injured employee precludes the statutory assignment of the injured employee's cause of action so that the injured employee retains his right to his claim and defendant's motion here to deny the injured employee that right must be denied.

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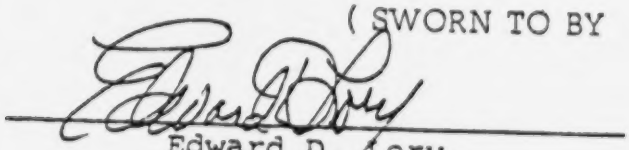


Edward D. Lory

ON NOV. 27,1978)

AFFIDAVIT OF JOSEPH T. STEARNS RE SETTLEMENT PROPOSED ORDER (Pages 67a to 72a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants herein. I make this affidavit in conjunction with the submission of an Order granting dismissal of plaintiff's complaint on grounds that suit against the defendants was not brought within six months of an order of the Federal Workmen's Compensation Board awarding compensation and that as a result plaintiff's action is untimely brought against the shipowner, as the claim asserted by plaintiff has been assigned by operation of 33 U.S.C. 933(b) to his former employer,

International Terminal Operating Co., Inc.

2. This motion was made April 21, 1978 and was contested by the attorneys for the plaintiff. On September 13, 1978 the court's decision of September 12, 1978 disposing of the motion to dismiss on grounds of the statutory assignment as well as under Rule 56 FRCP for summary judgment on the question of shipowner's liability to plaintiff on the facts described in his pre-trial deposition (which aspect of the motion was denied) was filed. The court's opinion provided that decision on the motion to dismiss on grounds of the statutory assignment was reserved pending discovery to be completed within 60 days of the opinion. At issue, of course, was the plain language of 933(b) and the possibility that the plaintiff could escape its effect upon demonstration

of a conflict of interest between himself and his former employer.

3. It is obvious that the court expected that the attorneys for plaintiff, in view of their activity in this court on behalf of longshoremen claiming injury aboard ships, would have taken depositions or resorted to other discovery for purposes of demonstrating the conflict of interest which this court held necessary in order for plaintiff to escape the literal application of §933(b). No effort to make the showing required by the court's opinion has been made. Instead, on or after November 27, 1978 plaintiff, more than 60 days from the court's decision, filed an untimely attorney's affidavit purporting to inform the court of an inconclusive alleged telephone conversation with a representative of International Terminal Operating Co., Inc. Defendants' motion was made under 933(b) and for procedural purposes under

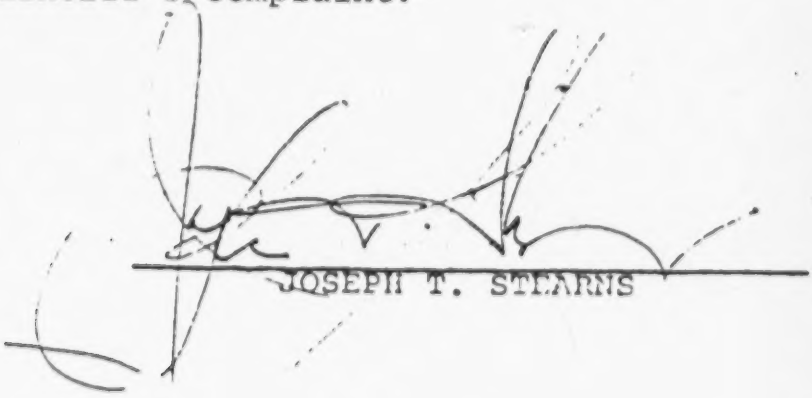
Rules 12 and 56 FRCP. Perhaps judgment on the pleading (Rule 12) was in the first instance properly invoked. However, the court's decision clearly brought the matter within Rule 56 (summary judgment) by allowing plaintiff a question of fact regarding conflict of interest. Rule 12 , of course (sebsection (b)), provides that a Rule 12 motion becomes a motion for summary judgment under Rule 56 when "matters outside the pleadings are presented." This is clearly so here. Rule 12 also provides that all parties have "reasonable" opportunity to present all material made pertinent by Rule 56. Certainly, 60 days is a "reasonable" opportunity accorded plaintiff to make the showing required.

4. Rule 56(e) provides, however, that affidavits in support or opposition to a summary judgment motion"...shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Rule further provides that a party may not rest on mere allegations or denials in his pleadings but "must set forth specific facts showing there is a genuine issue for trial."

5. Plaintiff has not complied with Rule 56. His response was untimely, incomplete, unclear, subject to a hearsay objection and is in sum, woefully inadequate. Mr. Lory's affidavit is so insubstantial as to be an affront to the court, particularly in light of the concern demonstrated by the exhaustive treatment of the issue in the court's opinion of September 12, 1978. Giving effect to Rule 56(e) requires this court to conclude that no showing of conflict has been made, forgetting for the moment that the purported showing is untimely.

6. The motion under 933(b) should now be granted in accordance with the court's memorandum and order of September 12, 1978. No conflict of interest having been demonstrated and there being no reason to presume the existence of such a conflict in absence of such proof, it is appropriate for the court now to dismiss plaintiff's complaint.

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ORDER OF DISMISSAL DATED DECEMBER 6, 1978
(Pages 73a to 75a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendants having duly moved this court by notice of motion dated April 21, 1978 for an order pursuant to Title 33 U.S.C.A. §933(b) dismissing this case because not brought within six months of an award of compensation and said motion having regularly come on to be heard before the Honorable Robert L. Carter, to whom this case is assigned for all purposes, on May 5, 1978

NOW, upon reading and filing the affidavits of JOSEPH T. STEARNS, duly sworn to the 21st of April and 29th of November, 1978, and the affirmation in opposition to the motion of Edward D. Lory executed May 18, 1978 and due deliberation having been had thereon, and the court by memorandum and order filed

September 13, 1978 having reserved decision on the said motion to dismiss pursuant to Title 33 U.S.C.S. §933(b) pending opportunity for plaintiff, through discovery to be completed within 60 days, to demonstrate a conflict of interest between plaintiff and International Terminal Operating Co., Inc., plaintiff's former employer and the stevedore engaged to load and/or discharge cargo aboard defendant's vessel on the day of the alleged accident, sufficient to avoid application of the literal language of the said statute; and the attorney for plaintiff having made no showing of the existence of any such conflict of interest and having made no effort to take any discovery for this purpose, and the 60 days provided by the court having elapsed it is

ORDERED that the motion pursuant to Title 33 U.S.C.A. §933(b) to dismiss this case for failure to commence suit

within six months of an award of compensation be and hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice and with costs to the defendants.

Dated: New York, New York
December 6, 1978

Robert L. Carter
U.S.D.J.

PLAINTIFF'S NOTICE OF MOTION TO VACATE DISMISSAL (Pages 76a to 79a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S:-

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law, the plaintiff will move this Court before The Honorable Robert L. Carter, U.S.D.J., for an Order pursuant to Rule 60(b) vacating the Order of Dismissal filed December 8, 1978, and granting to the plaintiff a rehearing on defendant's motion for summary judgment upon the grounds:

I. That the Court in its opinion herein quotes the regulations 20 C.F.R., Sec. 702.315 (a) as holding it to be an "explicit command" to embody the agreement of settlement in a formal compensation order. The Court has overlooked the regulation which does not command the entry of an order. To the contrary, the regulations permit the entry of an order or a memorandum.

II. That the Court was in error in holding that based on "the way in which administrative agencies perform their function" and because the regulations empowered the Deputy

Commissioner to delegate his duties to a delegee, there is "no reason to believe that the claims examiner who presided over the informal conference" was not his delegee. The Court concluded erroneously that the "ordering of compensation by a claims examiner or any other delegee of the Deputy Commissioner" satisfies the purpose of the award requirement. But the Court has been misled as 20 C.F.R. Sec. 702.312 states that no one may issue a compensation order except the Deputy Commissioner; that the designee is not authorized to issue such an Order; the Deputy Commissioner does not have the power to authorize anyone to issue a compensation order.

III. That the Court had overlooked the Statute itself and the regulations when it held that "no statutory purpose is furthered by requiring the endorsement of an actual Deputy Commissioner on an award." The statute specifically states that before an order be issued there must be a determination by the Deputy Commissioner that it is in the best interests of the injured employee.

To call such a determination or adjudication a technicality and the non entry of an Order after settlement a "technical administrative lapse" is contrary to the intent of Congress and the meaning of the statute and regulations.

IV. That the Court was in error in holding that "the settlement agreement is a compensation order." This holding is not only contrary

to the decision of the Supreme Court in Intercounty Construction Corporation, et al. v. Noah C.A. Walter, etc. 422 U.S. 1, 95 S. Ct. 2016.

V. That since the Claims Examiner is not authorized to issue a compensation order; since the Deputy Commissioner cannot empower the Claims Examiner to make an order; and since the Deputy Commissioner must make a determination or adjudication that it is in the best interests of the employee before an order is filed, the Court was in error in filing a report of a settlement on an informal conference signed by a Claims Examiner to be the equivalent of a compensation order. If the Claims Examiner cannot make an order, his acts cannot be construed to constitute an order.

There being no order, formal or informal, the six-month period does not run as a result of the compensation settlement herein.

PLEASE TAKE FURTHER NOTICE, that the within motion will duly come on to be heard at the United States District Courthouse for the Southern District of New York at Foley Square, City and State of New York, on the 29th day of December, 1978 at 10:00 A.M. in the forenoon

of that day and/or at a date and time

that the Court may hereinafter direct.

Dated: New York, New York
December 15, 1978

Yours, etc.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

By /s/ Morris Cizner
Office & P.O. Address
160 Broadway
New York, New York 10038

TO: WALKER & CORSA, ESQ.
Attorneys for Defendant
25 Broad Street
New York, New York 10004

MEMO ENDORESEMENT DATED JAN. 18, 1979,
DENYING MOTION.

JANUARY 17, 1979

Motions to vacate judgment and for a Rehearing denied.

So Ordered

Robert L. Carter

U.S.D.J.

OVAL STAMP OF

U.S. DISTRICT COURT
FILED
JANUARY 18, 1979
S.D.N.Y.

AFFIDAVIT OF JOSEPH T. STEARNS IN OPPOSITION
(Pages 81a to 83a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and member of Walker & Corsa attorneys for defendants. I submit this affidavit in connection with the settling of a proposed order offered by Zimmerman & Zimmerman, attorneys for plaintiff in disposition of defendants' motion to dismiss pursuant to §933(b) of the Longshoremen's and Harbor Worker's Compensation Act. This motion was decised by Memorandum and Order filed September 13, 1978.

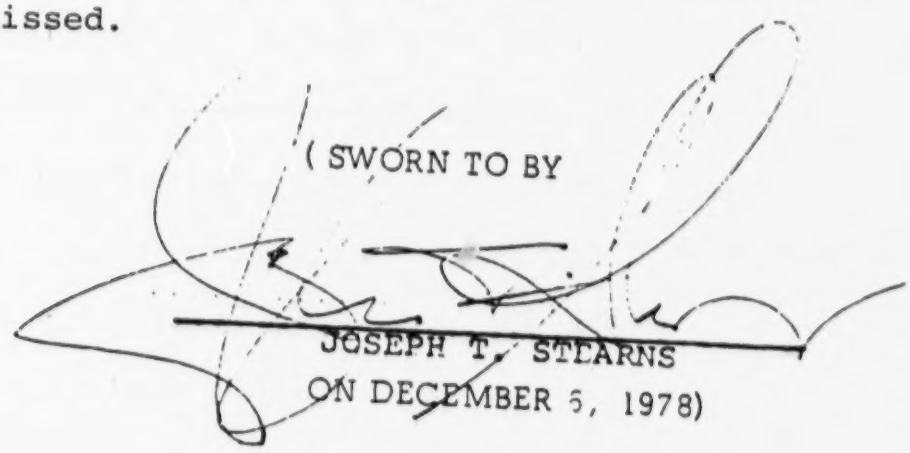
2. The motion was, in essence, granted subject to proof within 60 days of a conflict of interest between plaintiff's

former employer and plaintiff. Plaintiff's 60 days expired about November 11, 1978, without any effort being made by the attorneys to make the required showing. Defendants have submitted a proposed order granting dismissal upon this basis. In response, the attorneys for plaintiff submitted an order extending their time retroactively to take testimony for the purpose of attempting to make the required showing.

3. It is our belief that this is not the true function of the settling of an order after a decision by the court. It is not proper to put in an order extending time retroactively without moving by order to show cause or notice of motion for relief in the form of a material change in the court's tentative disposition of a litigated motion. We, accordingly, object to plaintiff's efforts to extend his time after the time provided by the

court had elapsed.

4. We also should note in connection with the submission and settlement of our own order dismissing this case on the basis of the court's September 13, 1978 decision, that plaintiff's order concedes that its affidavit, tardily presented, which was all that was offered for the point is "insufficient pursuant to F.R.C.P. Rule 56". This is a confession that the showing required by the court with respect to conflict of interest has not been made. For this reason, among others, this matter should be finally dismissed.



NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Notice is hereby given that the plaintiff herein, FREDERICO RODRIGUEZ, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of dismissal dated December 6, 1978 (docketed December 8, 1978) and from the Order dated January 17, 1979 denying plaintiff's motion for vacatur and rehearing.

Yours, etc.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

By:
160 Broadway
New York, New York 10038
(212) 227-1350

WALKER & CORSA, ESQS.
Attorneys for Defendants
Compass Shipping Co. Ltd. and
D. Jakarta Lloyd P.N.
25 Broad Street
New York, New York 10004
(212) 344-4700

STIPULATION AS TO EXHIBITS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

The undersigned parties hereby stipulate and agree that the attached exhibits shall become part of the Record on Appeal in the captioned matter:

A. Agreement, dated November 4, 1974;

B. U. S. Department of Labor letter, dated September 4, 1973.

Dated: New York, New York
February 27, 1979

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

/s/ _____

WALKER & CORSA,
Attorneys for Defendants

/s/ _____

EXHIBIT A, ANNEXED TO FOREGOING STIPULATION.

(Same as Exhibit C, Annexed to Affidavit of Joseph T. Stearns, printed, *supra*, at pp. 41a to 42a.)

EXHIBIT B, ATTACHED TO FOREGOING STIPULATION
(Pages 87a to 88a.)

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
1515 Broadway (At West 44th St.)
New York, NY 10036

Office of Workers Compensation Programs
May 22, 1978

File No: 2-29100
Re: Federico Rodriguez
Vs: I. T. O. #73-692
Inj: 9/4/73

Israel, Adler, Ronca & Gucciardo
Attorneys at Law
ATTN: Angelo C. Gucciardo, Esq.
160 Broadway
New York, New York 10038

Dear Sirs:

Reference is made to your letter dated May 19, 1978 concerning the compensation case of the above captioned claimant.

You advise in your letter that a third party case is pending in the U.S. District Court and that "A serious question of Law has been presented to the Court and before a decision can be made it must be determined whether or not the attached stipulations reflecting an agreement entered into on November 4, 1974 constitutes a Formal Order."

Review of our file shows, as you indicate, that the parties had stipulated to the issues on the claim. The self-insured employer voluntarily made payment of the compensation in accordance with the stipulations.

To the present, a Formal Order has not been issued.

It is hoped that the above is responsive to your inquiry.

Sincerely,

Michael J. Collura

MICHAEL J. COLLURA
Acting Deputy Commissioner

cc: Mr. Federico Rodriguez, Apartment 11-G, 589 Amsterdam Avenue, New York, New York 10024

JSB/mw

Attachment

# 79-7630

## United States Court of Appeals

FOR THE SECOND CIRCUIT

SRECKO BARULEC,

*Plaintiff-Appellant,*

—against—

OVE SKOU, R.A.,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# JOINT APPENDIX

ZIMMERMAN & ZIMMERMAN,
*Attorneys for Plaintiff-Appellant*
160 Broadway
New York, N.Y. 10038
(212) 227-1350

HAIGHT, GARDNER, POOR & HAVENS,
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

DOCKET ENTRIES (Pages 91a to 92a.)

| Date | NR. | Proceedings |
|---|---|---|
| 2-22-78 | 1 | Fld Complaint.. Issued Summons. |
| 3-9-78 | 2 | Fld Summons and marshals ret. Served Ove Skou R.A. & South African Marine Corp. on 2-24-78 |
| 3-27-78 | 3 | Fld Certificate of mailing of Summons & complaint by registered mail, addressed to: OVE SKOU H.C. ANDERSEN's BOULEVARD 44-46 DK 1553 Copenhagen 5, Denmark receipt #224464 Served: |
| 8-14-78 | 4 | Filed deft's Answer to Complaint (HGP&H) |
| 8-14-78 | 5 | Filed deft's Interrogatories |
| 8-14-78 | 6 | Filed deft's Notice of Examination of pltff on 9-28-78 |
| 10-30-78 | 7 | Fld pltffs. answers to interrogs. |
| 12-8-78 | 8 | Fld defts. Notice of Motion for leave to serve & file an amended answer & for summary judgment pur to rule 15 FRCP & 56 FRCP. Ret. 12-29-78. hgph |
| 12-8-78 | 9 | Fld dfts. Memo. of Law. |
| 2-13-79 | 10 | Fld Dfts. Reply affdvt. |
| 2-13-79 | 11 | Fld Dfts Reply Memo of Law. |

PREVIOUS PAGE WAS BLANK

| Date | NR. | Proceedings |
|---|---|---|
| 6-4-79 | 12 | Filed Opinion #48661. dfts. motion to amend answer granted. dfts. motion for summary judgment. denied without prejudice Motion & renewed motion after 45 days. So Ordered Lasker J (mn) |
| 7-19-79 | 13 | Filed Dfts. Notice of Motion & Supporting papers renewing dfts. motion for summary judgment pur to rule 56 FRCP, etc. Ret. 7-27-79 hgph |
| 8-3-79 | 14 | Filed Pltffs. Affdvt in opposition to Morris Cizner. |
| 8-10-79 | - | Filed Memo Endorsed on deft's motion for summary judgment. Motion is granted for summary judgment dismissing this action...Lasker, J. m/n |
| 8-15-79 | 15 | ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed... Clerk. |
| 9-4-79 | 16 | Filed Pltffs. Notice of Appeal from judgment. ent. 8-8-79, (mailed notice to Haight Bardner Poor & Havens 1 St Street. Plaza, nyc 10004) |

NOTICE OF MOTION FOR LEAVE TO SERVE AND FILE AN AMENDED ANSWER AND FOR SUMMARY JUDGMENT (Pages 93a to 95a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - - -X

SRECKO BARULEC,

*Plaintiff,*

*-against-*

OVE SKOU R. A.,

*Defendant.*

78 Civ. 786 (MEL)

- - - - - - - - - - - - - - - - - - - - - - - - -X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit, Exhibits, Memoranda, Rule 9(g) Statement and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Morris Lasker in Room 1903 at the United States Courthouse, Foley Square, City, County and State of New York on the 29th day of December, 1978, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for

an order pursuant to Rule 15 of the Federal Rules of Civil Procedure granting leave to serve an Amended Answer and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting Summary Judgment dismissing the Complaint of the plaintiff against the defendant, on the ground that plaintiff's cause of action against this defendant, if any, has been assigned, pursuant to 33 U.S.C. §933(b), to the plaintiff's employer and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that you are required to serve your response, if any, at least three (3) days prior to the return date of this motion.

Dated: New York, New York
December 8, 1978

Yours, etc.,

HAIGHT, GARDNER, POOR
& HAVENS,
Attorneys for Defendant

BY:
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:
ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

STATEMENT PURSUANT TO RULE 9(g) (Pages 96a to 97a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendant contends that there is no genuine issue to be tried as to the following material facts:

1. Plaintiff commenced this suit on February 22, 1978 to recover damages for injuries allegedly sustained on January 6, 1975 under circumstances bringing the unjuries within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

2. Plaintiff filed a claim for compensation benefits from his employer under the Longshoremen's and Harbor Workers' Compensation Act.

3. This claim was adjudicated by the United States Department of Labor at a conference on February 11, 1976 at which time an award was issued.

4. Plaintiff was paid and accepted compensation for the injuries alleged in the Complaint under an award in a compensation order dated February 11, 1976.

Dated: New York, New York
December 8, 1978

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

By:
One State Street Plaza
New York, New York 10004
(212) 344-6800

AFFIDAVIT OF RICHARD K. MATANLE II (Pages 98a to 101a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

RICHARD K. MATANLE II, being duly sworn, deposes and says:

I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for the defendant Ove Skou R.A. I submit this Affidavit in support of the motions of Ove Skou R.A., for leave to serve an amended pleading pursuant to F.R.C.P. 15(a) in the form annexed hereto (Defendant's Exhibit A) and for Summary Judgment pursuant to F.R.C.P. 56 on the grounds that the plaintiff in this action has assigned any cause of action against this defendant to his employer.

Plaintiff commenced this action by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Plaintiff seeks to recover damages for injuries allegedly sustained on January 6, 1975 while working in the employ of Universal Maritime Service Corp., and assisting in the discharge of the defendant's vessel, the M/S MEETE SKOU. Defendant served an Answer to the Complaint on August 14, 1978.

The records of the United States Department of Labor, Office of Workers' Compensation Program reveal that plaintiff filed a claim for all benefits to which he was entitled under the Longshoremen's and Harbor Workers' Compensation Act for the injuries allegedly sustained on January 6, 1975, (Defendant's Exhibit B). Thereafter, compensation was paid without an award from January 10, 1975

until March 14, 1975. (Defendant's Exhibits C and D). On March 25, 1975, a claim for additional compensation was made by the representative of the plaintiff and a conference in the matter was requested at that time as well as in later letters of August 18, 1975 and December 22, 1975. (Defendant's Exhibits E, F and G). Thereafter a conference was held on February 11, 1976 before the United States Department of Labor, Compensation Board at which time a settlement of this claim was reached. (Defendant's Exhibit H). Payment of compensation in accordance with this award was made by the compensation insurance company and notice of this payment was given to the United States Department of Labor on February 13, 1976. (Defendant's Exhibit I).

In accordance with the above stated facts, plaintiff accepted compensation under an award dated February 11, 1976 and did not commence suit in this matter until February 22, 1978, more that six months after the date of the

award. Such being the case, plaintiff is not entitled to prosecute this action since all rights of the plaintiff to recover damages against any third party, including the defendant, have been assigned to plaintiff's employer. 33 U.S.C. §933(b).

WHEREFORE, defendant respectfully requests that this Court grant its motions for leave to serve and file an Amended Answer and for Summary Judgment based on the grounds that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

s/ RICHARD K. MATANLE II

(Jurat omitted in printing.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 102a to 108a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendant, by its attorneys, Haight, Gardner, Poor & Havens, answering the Complaint of the plaintiff herein, respectfully alleges upon information and belief as follows:

FIRST: Admits each and every allegation contained in Paragraphs I, II, and V of the Complaint.

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs III, VIII, IX, and XI of the Complaint.

THIRD: Denies each and every allegation contained in Paragraphs IV, X, XIV, XV, XVI, XVII, and XVIII of the Complaint.

FOURTH: Admits that at all the times mentioned, the defendant manned said vessel and its master, officers and crew were on board said vessel and

in possession of same, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over the stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph VI of the Complaint.

FIFTH: Admits that at all the times mentioned, the defendant managed, operated, maintained and controlled said vessel, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph VII of the Complaint.

SIXTH: Admits that at all the times mentioned, the defendant maintained hatch No. 5 of said vessel, except for those parts and portions of the vessel, her

gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph XII of the Complaint.

SEVENTH: Admits that at all the times mentioned in the Complaint, the said hatch No. 5 of said vessel was a part of said vessel and was maintained, supplied and provided by defendant to longshoremen for use in connection with the performance of their stevedoring work on board said vessel, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph XIII of the Complaint.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

EIGHTH: That if plaintiff sustained any injuries as alleged in the Complaint, the same were caused or contributed to by his own negligence, the negligence of his co-employees, the negligence of his employer, or the negligence of others for whose actions the defendant is not liable.

FURTHER ANSWERING THE COMPLAINT AND FOR A SECOND, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

NINTH: That plaintiff's employment had certain risks incident thereto which were obvious and well known to plaintiff at all times during said employment and during the continuance thereof; that whatever injuries plaintiff received

in the course of said employment and which are complained of by said plaintiff herein arose because of said risks, all of which were taken and assumed by plaintiff at the time he first entered upon said employment and during the continuance thereof.

FURTHER ANSWERING THE COMPLAINT AND FOR A THIRD, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

TENTH: That the cause of action set forth in the Complaint is barred by laches and/or the appropriate statute of limitations.

FURTHER ANSWERING THE COMPLAINT AND FOR A FOURTH, SEPARATE PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

ELEVENTH: The Court lacks jurisdiction over the person of the defendant.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIFTH, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

TWELFTH: The Court has no jurisdiction over the person of defendant due to insufficiency of service of process.

FURTHER ANSWERING THE COMPLAINT AND FOR A SIXTH, SEPARATE, AFFIRMATIVE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

THIRTEENTH: Repeats and realleges each and every admission, denial of knowledge or information and allegation hereinabove set forth with the same force and effect as if set forth at length herein.

FOURTEENTH: That plaintiff accepted compensation for the injuries alleged in the Complaint under an award in a compensation order.

FIFTEENTH: That plaintiff commenced suit to recover damages for the injuries alleged in the Complaint more than six months after the award of compensation alleged in Paragraph FOURTEENTH of this Amended Answer.

SIXTEENTH: That any claim that plaintiff may have against this defendant for the injuries alleged in the Complaint has been assigned to plaintiff's employer pursuant to 33 U.S.C. §933(b).

WHEREFORE, defendant demands judgment dismissing the Complaint of plaintiff, together with costs and disbursements of this action.

Dated: New York, New York
December 6, 1978

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

BY:
A Member of the Firm

One State Street Plaza
New York, New York 10004

EXHIBIT B, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 109a to 112a.)

U.S. Department of Labor
Wage and Labor Standards Administration
Bureau of Employees Compensation

EMPLOYER'S FIRST REPORT OF ACCIDENT OR OCCUPATIONAL ILLNESS

1. BEC Case Number

2. Carrier's Number 50530.

3. Name of Injured Employee Srecko Barulic.

4. Date of Injury January 6, 1975.

5. Employee's Address 25-77 49th Street, Astoria, L.I., N.Y.

6. Accident is Being Reported Under the Following Act (X) Longshoremen's and Harbor Workers' Compensation Act.

7. Sex (X) Male.

8. Age or Date of Birth 40.

9. Social Security Number 087-36-8324.

10. On Date of Injury Give a) Hour began Work 8:00 A.M., b) Hour of Accident 11:00 A.M. c) Did Employee Stop Work Immediately? (X) No.

11. Did Injury Cause Loss of Time Beyond Day or Shift of Accident?

12. Date and Hour Employee First did Not Return to Work

13. Date and Hour Pay Stopped

14. Date and Hour Employee Returned to Work

15. Occupation Holdman

16. Number of Years in this Occupation

17. Injured while doing such Work (X) yes.

18. Years in your Employ

19. Number of Days Usually Worked Per Week

20. If Injured on a Vessel, what was Being Done to, on, or from the Vessel A. (X) Loading or Unloading.

21. Wages or Earnings a) Hourly rate, b) Daily rate, c) Weekly, d) yearly.

22. Exact Place where Accident Occurred Pier 3 Port Authority, Brooklyn, N.Y. Vessel "METTE SHOU 12 IN".

23. Name of Foreman or Supervisor at time of Accident A. Gianotta.

24. Earliest Date Foreman or Employer knew of Accident January 6, 1975.

25. Describe in full how the Accident Occurred; while lifting bag of coffee, foot slipped on coffee beans, hurting back.

26. Nature of Injury Alleges: Injury to back.

27. If you Provided or Authorized Medical Attention, Give Date January 6, 1975.

28. Date Insurance Carrier Notified January 9, 1975.

29. Name of Physician Dr. Tagliagambe.

30. Address 110 President St., Brooklyn N.Y.

31. Name of Hospital

32. Address

33. Name of Insurance Carrier Midland Insurance Company.

34. Address 160 Water Street, New York, N.Y. 10038.

35. Name of Employer Universal Maritime Service Corp.

36. Address of Reporting Office One Broadway, New York, N.Y. 10004.

37. Nature of Employer's Business Stevedoring.

38. Signature of Person Authorized to Sign for Employer W.E. Coughlin.

39. Official Title of Person Signing this Report Assistant Vice President.

40. Date of this Report January 15, 1975.

EXHIBIT C, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 113a to 114a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Program

PAYMENT OF COMPENSATION WITHOUT AWARD.

1. BEC Case Number 3 P.A.

2. Carrier's Number 050530.

3. Name of Injured Person Srecko Barulic.

4. Address of Injured Person 25-77 49th Street, Astoria, N.Y.

5. Date of Accident or First Illness January 6, 1975.

6. Date Disability Began January 7, 1975.

7. Name of Injured, or Dependents of Injured, to Whom Compensation will be paid Srecko Barulic.

8. Average Weekly Wage $ Multiplied by 2/3=Compensation Rate $ TR-$105.00.

9. Compensation will be Paid from January 10, 1975.

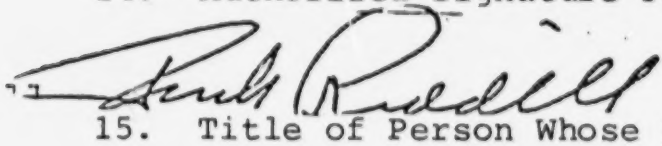
10. Date of First Payment January 17, 1975.

11. Name of Employer Universal Maritime Service Corp.

12. Address of Employer One Broadway, New York, N.Y. 10004.

13. Name of Insurance Carrier Midland Insurance Company.

14. Authorized Signature Frank Riddell



15. Title of Person Whose Signature appears on Item 14 Supervisor, Compensation Claims.

16. Date Signed January 17, 1975.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 115a to 116a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Program

COMPENSATION PAYMENT STOPPED OR SUSPENDED.

1. BEC Case Number 3 P.A.

2. Carrier's Number 50530.

3. Name and Address of Employee Srecko Barulic, 25-77 49th Street, Astoria, L.I. N.Y.

4. Name of Employer Universal Terminal & Steve. Corp.

5. Address of Employer 1 Broadway, New York, N.Y. 10004.

6. Date of Injury January 6, 1975.

7. Date Employee First did not Work Because of Injury January 7, 1975.

8. Date Physician found Employee able to Return to Work

9. Date Employee Returned to Work

10. Average Weekly wage $275.41 Multiplied by 2/3=Compensation Rate $183.61.

11. Give Reasons Why Payments have been Stopped or Suspended No further disability per attached medical.

12. Date of this Notice March 14, 1975.

13. Date Last Payment Made March 14, 1975.

14. List all Disability Payments,

a. Type of Disability, Temporary Total.

b. From January 7, 1975.

c. To March 6, 1975.

d. Amount Paid Per Week $183.61.

e. Number of Weeks Paid 8 1/7.

f. Total $1495.11.

15. List all Payments Made on Account of Death

16. Name of Insurance Carrier or Self-Insured Employer Midland Insurance Company.

17. Signature of Person Authorized to sign for Carrier Frank Riddell.

18. Title of Person Whose Signature appears in Item 17 Supervisor, Comp. Claims.

EXHIBIT E, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II.

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, N.Y. 10038
Telephones Barclay 7 1350-1351-1352

U. S. Department of Labor
Office of Workmen's Compensation Programs
1515 Broadway
New York, New York

RE: Stricko Barulic vs
Univ Term & Steve
U. S. #------
Carrier: Midland
D/A: 1/6/75

March 25, 1975

Gentlemen:

Enclosed, herewith, please find report of Dr. G. N. Haziris dated March 24, 1975. , which indicates that the claimant is still disabled and in need of further treatment.

We request that you kindly schedule this case for an early informal conference so that the claimant may receive his compensation benefits.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO

SA:dg
Encl.

EXHIBIT F, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II .

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, N.Y. 10038
Telephones: Barclay 7 (1350 1351 1352)

August 18, 1975

U.S. Department of Labor
Bureau of Employee's Compensation
321 West 44th Street
New York, New York

RE: Stricko Barulic vs Univ Term Steve

U.S. # 2-38150
Carrier: Midland
Carrier: #50530
D/A: 1/6/75

Gentlemen:

We enclose herewith, report of Dr. George N. Haziris dated August 18, 1975.

We ask that the case be scheduled for an early conference.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO

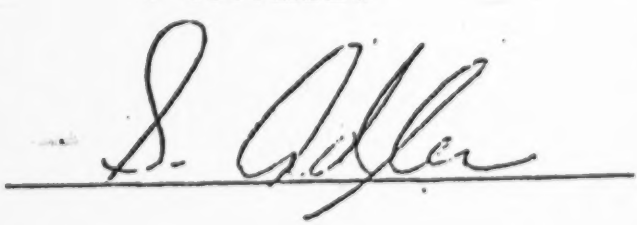


EXHIBIT G, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II.

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, New York 10038
Telephones: Barclay 7 - 1350-1351-1352

December 22, 1975

U. S. Department of Labor
Office of Workmen's Compensation Programs
1515 Broadway
New York, New York

RE: Stricko Barulic vs
Univ Term & Steve
U.S. # 2 38150
D/A: 1/6/75

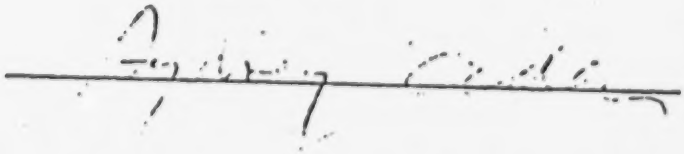
Gentlemen:

We have filed the report of Dr. George Haziris dated August 18, 1975, giving schedule loss evaluation.

We would appreciate having the case scheduled for an early conference for final disposition.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO



SA:dg

EXHIBIT H, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 120a to 124a.)

MEMORANDUM OF INFORMAL CONFERENCE
(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

U.S. Department of Labor
Employment Standard Administration
Office of Workers' Compensation Programs

1. Claimant Srecko Barulic.

2. OWCP File Number 2-38150.

3. Employer Universal Terminal & Steve.

4. Carrier/Employer's Number 50530.

5. Insurance Carrier Midland Ins. Co.

6. Date of Conference February 11, 1976.

7. Date of Injury January 6, 1975.

8. Appearances: (XX) Claimant present For Claimant Mr. A. Gucciardo, For Employer/ Carrier Mr. J. Downey. Issues: Disability - Temporary and permanent.

9. The Claimant sustained/alleges an accidental injury on the day in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 et seq.)

or an extension thereof, resulting in the following injury(ies): Injury to back and left hip.

10. Prior conferences were held on None the employer/carrier have paid compensation for this injury in the amount of $1,495.11 for the following periods: 1-7-75 to 3-6-75, 8 1/7 weeks at $183.61.

11. Present Claim: Temporary total disability for entire period 15% permanent partial disability left leg.

12. Employer/Carrier's Position No causally related disability after 3-6-75. No Schedule loss carrier requests exam by Impartial Consultant.

13. Average Weekly Wage (Sec. 10) $275.41 (XX) As stipulated by parties.

14. Compensation rate (2/3 x AWW) $183.61.

15. Claimant (XX) Returned to Work on April 4, 1975.

16. Medical costs related to the injury (XX) have been paid.

Upon discussion of the issues involved among those present, together with due considerations to all information in the administrative file, the following recommendation is made.

RECOMMENDATION.

Compensation is to be paid as follows:

After review of all evidence in file and considering that developed at the conference this examiner makes the following recommendation which is felt to be equitable to all parties:

Pay compensation for temporary total disability from 1-7-75 to 4-3-75, 12 3/7 weeks at $183.61, in the amount of $2,282.01, less $1,495.11 paid, leaving a balance due of $786.90.

In addition, pay compensation for 6% permanent partial disability left leg, 17.28 weeks at $183.61, in the amount of $3,172.78.

FEE.

Approved Fee: $485.00

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee (to include expenses) is approved in favor of: Israel, Adler, Ronca & Gucciardo, Esqs. (XX) This fee is for an attorney and is made a lien on the compensation recommended.

It has reasonably been determined in accordance with Section 702.132 of the regulations, that the above fee is adequate and reasonable for the necessary services rendered.

ACTION BY EMPLOYER/CARRIER.

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

Frank Voelker,

*(Claims Examiner)*

February 11, 1976

*(Date this memorandum issued)*

EXHIBIT I, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 125a to 127a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers' Compensation Program

COMPENSATION PAYMENT STOPPED OR SUSPENDED.

1. BEC Case Number 2-38150.

2. Carrier's Number 50530.

3. Name and Address of Employee Srecko Barulic 10 Irving Lane, New Hyde Park, N. Y. 11040.

4. Name of Employer Universal Terminal & Steve. Corp.

5. Address of Employer 1 Broadway, New York, N.Y. 10004.

6. Date of Injury January 6, 1975.

7. Date Employee First did not Work Because of Injury January 7, 1975.

8. Date Physician found Employee able to Return to Work.

9. Date Employee Returned to Work.

10. Average Weekly Wage $275.41 Multiplied by 2/3=Compensation Rate $183.61.

11. Give Reasons why Payments have been Stopped or Suspended As per Memorandum February 11, 1976.

12. Date of this Notice February 13, 1976.

13. Date Last Payment made February 13, 1976.

14. List all Disability Payments.

a. Type of Disability Temporary Total, b. from January 7, 1975, c. to April 3, 1975 d. Amount paid per week $183.61 e. Number of weeks paid 12 3/7. Total $2282.01.

a. Type of Disability Permanent Partial, b. Percent 6%, c. Part of Body 1/leg, d. Amount Paid Per Week $183.61, e. Number of Weeks Paid 12 3/7, 17.28 Total $3172.78.

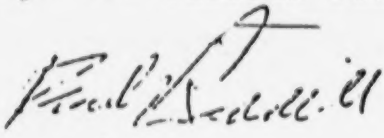
Total $5454.79.

15. List all Payments made on Account of Death.

16. Name of Insurance Carrier or Self-insured Employer Midland Insurance Company.

17. Signature of Person Authorized to

Sign for Carrier Frank Riddell



18. Title of Person Whose Signature Appears in Item 17 Supervisor, Comp. Claims.

ANSWERING AFFIDAVIT OF MARTIN LASSOFF IN OPPOSITION TO MOTION (Pages 128a to 130a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

MARTIN LASSOFF, being duly sworn, deposes and says:

That I am associated with the office of ZIMMERMAN & ZIMMERMAN, the attorneys of record for the plaintiff in the above entitled action. I am fully familiar with this case and the facts set forth herein, and submit the following in opposition to defendant's motion herein.

That at the time of the accident plaintiff was a longshoreman employed by UNIVERSAL TERMINAL STEVEDORING CORP. Their Workmen's Compensation insurance carrier is the MIDLAND INSURANCE COMPANY and JOHN RICHARDSON is the claims attorney for Midland.

That JOHN RICHARDSON informs me that MIDLAND INSURANCE COMPANY has not and will not make any claim, bring an action, or maintain any action against the shipowner to recover damages for its negligence when a longshoreman is injured and the Company or its client stevedore could bring such action because to do so would prejudice their clients who fear that it would adversely affect their economic relationship with the steamship company.

That JOHN RICHARDSON was advised that this information was to be used in connection with this motion and any similar motion in any other case involving the same defense. He authorized me to quote him and report the foregoing to this Court.

It is submitted that in view of the foregoing, there is a conflict of interest between plaintiff longshoreman

and the stevedore employer and that motion should be denied.

MARTIN LASSOFF

(Jurat omitted in printing.)

REPLY AFFIDAVIT OF RICHARD K. MATANLE II IN SUPPORT OF MOTION (Pages 131a to 136a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

RICHARD K. MATANLE II, being duly sworn, deposes and says:

That he is associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant, OVE SKOU.

This Affidavit is respectfully submitted in reply to plaintiff's affidavit and memorandum in opposition.

Plaintiff's opposition papers fail to raise any triable issues of fact sufficient to withstand defendant's present motion for Summary Judgment. Plaintiff has failed to submit any statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York. Consequently, the facts set forth in defendant's Rule 9(g) statement are deemed admitted

by plaintiff. Specifically the fact that plaintiff accepted compensation for the injuries alleged herein under an award in a compensation order dated February 11, 1976, as set forth in paragraph 4 of defendant's Rule 9(g) statement, is necessarily admitted for purposes of this motion.

Plaintiff would have this Court believe that defendant knew of the details of plaintiff's compensation proceedings far in advance of moving to amend its answer to assert the defense of assignment and moving on that basis for Summary Judgment. Based upon the assertion of defendant's knowledge of the compensation proceedings plaintiff thus questions the timeliness of defendant's motion to amend. The facts show however, that defendant first received complete records regarding plaintiff's compensation proceeding on November 27, 1978 when these records

were received from the United States Department of Labor pursuant to plaintiff's own executed authorization. (A copy of the Labor Department's letter of November 21, 1978 forwarding plaintiff's compensation records is annexed hereto as defendant's Exhibit A.) After reviewing plaintiff's compensation records, defendant promptly moved to amend its answer for Summary Judgment filing its motion eleven days later, on December 8, 1978. Plaintiff's vague assertion of some sort of bad faith delay on the part of defendant in moving for the relief sought herein is simply erroneous.

Plaintiff would further have the Court believe the decision by Judge Carter in Rodriguez v. Compass Shipping Co., Ltd., now reported at 456 F. Supp. 1014, which defendant has cited and a copy of which defendant attached to its original Memorandum of Law, lacks force because

a motion is pending to reargue the dismissal in that case. (A copy of the Order of Dismissal dated December 6, 1978 is annexed hereto as Exhibit B). While plaintiff in the Rodriguez case did make an application for reargument of Judge Carter's order of dismissal and to vacate that dismissal, plaintiff's motion was denied on January 17, 1979 (Defendant's Exhibit C).

The hearsay affidavit submitted by plaintiff's attorney outlining a conversation with a claims attorney representing the stevedoring company's insurance carrier is insufficient to establish any actual conflict of interest between plaintiff and his employer. Furthermore, and even more significantly, plaintiff's attorney's hearsay affidavit is insufficient as evidence submitted in opposition to a motion for Summary Judgment under Rule 56 of the Federal Rule of Civil Procedure and, as such, the alleged facts asserted

in that affidavit must be disregarded. Even if the affidavit of plaintiff's attorney was sufficient to establish the fact that the stevedore's insurance carrier probably would not bring suit against the shipowner in a particular case, this fact, if assumed, does not establish any conflict of interest between plaintiff and employer. For example, the stevedore's decision not to bring suit against the shipowner could very simply be due to the fact that upon evaluation of the case, the stevedore and/or its compensation insurance carrier have decided that facts of the case and circumstances of the accident and resulting injury do not justify an action against the shipowner.

WHEREFORE, defendant respectfully requests that this Court grant its motions for leave to serve and file an Amended Answer and for Summary Judgment based

on the grounds that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

RICHARD K. MATANLE II

(Jurat omitted in printing.)

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. MATANLE II.

1346

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
1515 Broadway (At West 44th St.)
New York, N.Y. 10036

November 21, 1978

File No. 2-38150
Strecko Barilec

Haight, Gardner, Poor & Havens
One State Street Plaza
New York, N.Y. 10004

Enclosed are the copies requested by your office, for which the charge is $3.05.

Upon receipt, please forward your check in the amount of $3.05.

Check should be made out to the Department of Labor, address envelope to Attention of the Undersigned.

Sincerely,

Iris Santos

Iris Santos
Telephone # 399-5276

IS:rg

Enclosure

EXHIBIT B, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. MATANLE II (Pages 138a to 140a.)

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - X

FEDERICO RODRIGUEZ,

*Plaintiff,*

*-against-*

COMPASS SHIPPING COMPANY LTD. and D. JAKARTA LLOYD P.N.,

*Defendants.*

77 Civ. 3378 (RLC)

- - - - - - - - - - - - - - - - - - - - - - - X

Defendants having duly moved this court by notice of motion dated April 21, 1978 for an order pursuant to Title 33 U.S.C.A. §933(b) dismissing this case because not brought within six months of an award of compensation and said motion having regularly come on to be heard before the Honorable Robert L. Carter, to whom this case is assigned for all purposes, on May 5, 1978

NOW, upon reading and filing the affidavits of JOSEPH T. STEARNS, duly sworn to the 21st of April and 29th of November, 1978, and the affirmation in opposition to the motion of Edward D. Lory executed May 18, 1978 and due deliberation having been had thereon, and the court by memorandum and order filed September 13, 1978 having reserved decision on the said motion to dismiss pursuant to Title 33 U.S.C.A. §933(b) pending opportunity for plaintiff, through discovery to be completed within 60 days, to demonstrate a conflict of interest between plaintiff and International Terminal Operating Co., Inc., plaintiff's former employer and the stevedore engaged to load and/or discharge cargo aboard defendant's vessel on the day of the alleged accident, sufficient to avoid application of the literal language of the said statute; and the attorney for plaintiff having

made no showing of the existence of any such conflict of interest and having made no effort to take any discovery for this purpose, and the 60 days provided by the court having elapsed it is

ORDERED that the motion pursuant to Title 33 U.S.C.A. §933(b) to dismiss this case for failure to commence suit within six months of an award of compensation be and hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice and with costs to the defendants.

Dated: New York, New York
December 6, 1978

Robert L. Carter

U.S.D.J.

EXHIBIT C, ANNEXED TO REPLY AFFIDAVIT OF RICHARD MATANLE II.

January 17, 1979

Motion to vacate judgment on a releasing denied.

So ordered.

U.S. DISTRICT COURT FILED JAN 18 1979 S.D. OF N.Y.

U.S.D.J.

NOTICE OF MOTION RENEWING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Pages 142a to 143a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit, Exhibits and defendant's original Affidavit, Exhibits, Memoranda, and Rule 9(g) Statement filed on December 8, 1978, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Morris E. Lasker in Room 1903 at the United States Courthouse, Foley Square, City, County and State of New York on the 27th day of July, 1979 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard to renew their application for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting Summary Judgment dismissing plaintiff's action on the ground that plaintiff's

cause of action against this defendant, if any, has been assigned pursuant to 33 U.S.C. §933(b), to the plaintiff's employer and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 18, 1979

Yours, etc.,

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

By Richard K. Matanle II
One State Street Plaza
New York, New York 10004

TO:

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

AFFIDAVIT OF RICHARD K. MATANLE II IN SUPPORT OF MOTION (Pages 144a to 148a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

RICHARD K. MATANLE II, being duly sworn, deposes and says:

I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant OVE SKOU R.A. I submit this Affidavit in support of defendant's application renewing its motion for Summary Judgment originally filed with this Court on December 8, 1978.

Plaintiff commenced this action by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Plaintiff seeks to recover damages for injuries allegedly sustained on January

6, 1975 while working in the employ of Universal Maritime Service Corp. assisting in the discharge of defendant's vessel the M/S MEETE SKOU.

Plaintiff had previously filed a claim for compensation benefits from his employer under the Longshoremen's and Harbor Workers' Compensation Act based on the same injuries as alleged in this action, those injuries allegedly sustained on January 6, 1975. Plaintiff's compensation claim was adjudicated by the United States Department of Labor and he was paid and accepted compensation for these injuries under an award in a compensation order dated February 11, 1976.

Since plaintiff's compensation records revealed that he did not commence the action now before this Court within six months after the date of the compensation award, defendant made an application

to this Court to amend its answer to assert an additional defense of assignment based on 33 U.S.C. §933(b) and for Summary Judgment based on that defense.

Defendant's motions to amend and for Summary Judgment were filed on December 8, 1978 and were decided by this Court on May 31, 1979. (A copy of the Court's decision of May 31, 1979 is annexed hereto as Exhibit A).

In the Court's decision of May 31, 1979, defendant's motion to amend the answer to plaintiff's Complaint was granted and the Court held that under the undisputed facts of the case the action taken by the U.S. Department of Labor was sufficient to trigger an assignment to plaintiff's employer of plaintiff's right to sue defendant shipowner. The Court however recognized that a judicially created exception to an assignment under 33 U.S.C. §933(b) exists where plaintiff can show

that a conflict of interest existed between himself and his employer/assignee. The Court accordingly did not grant defendant's motion for Summary Judgment, giving plaintiff instead a period of forty-five days within which to submit competent evidence to establish that a conflict of interest between himself and his employer exists such as to exempt him from the assignment provisions of 33 U.S.C. §933(b). The Court granted defendant the right to renew its Summary Judgment motion after the forty-five day period had elapsed.

Forty-five days has since elapsed from the date of this Court's decision of May 31, 1979 and plaintiff has failed to submit <u>any</u> evidence whatsoever with regard to establishing the existence of a conflict of interest. Defendant therefore now renews its motion for Summary Judgment.

WHEREFORE, defendant respectfully requests that this Court grant its motion for Summary Judgment based on the ground that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

RICHARD K. MATANLE II

(Jurat omitted in printing.)

AFFIDAVIT OF MORRIS CIZNER IN OPPOSITION TO MOTION (Pages 149a to 161a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

MORRIS CIZNER, being duly sworn, deposes and says:

That I am a partner in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys of record for the above plaintiff and am familiar with the facts and circumstances herein.

Defendant moves for summary judgment based on a claim of a statutory assignment of plaintiff's cause of action. The claim is made that payment was made and accepted by plaintiff under an "award in a compensation order" triggering the assignment. Defendant also claims plaintiff has not sustained his burden of proof

that there was a conflict of interest with stevedores.

The most recent developments in the law appertaining, precludes the granting of the motion herein. The motion must be denied because: (1) Here there is no administrative order in the compensation case, and (2) If there was, defendant did not sustain his burden of proof to show that there is no conflict of interest with stevedore.

The defendant bases its claim on an Opinion of this Court as to the judge's understanding of the law in which a motion for summary judgment was denied with leave to renew. Again, in view of errors made in such Opinion and the most recent development of the law, the motion must be denied.

The Supreme Court of the United States in Edmonds v. Compagnie Generale

Transatlantique, decided June 27, 1979, No. 78-479, has clearly set forth the intent of Congress and the meaning of the 1972 Amendments to the LHWCA. It sets forth the ground rules and approach the courts must abide by in determining the application of the Statute.

It is submitted that the interpretation of the Supreme Court disagrees with the views set forth in a number of opinions heretofore issued by various judges. Our system of justice requires that such judges recognize that fact and make decisions in accordance with the Supreme Court holding. With all due respect to this Court, - this case here falls within that category and a different opinion is called for from this Court.

In Edmonds, the Supreme Court stated that the legislative history strongly counsels against the interpretation

of the Statute which modifies the longshoremen's pre-existing rights against the negligent vessel (page 9 of the Opinion). The reports and the debates leading up to the 1972 Amendments contained not one word of any changed interpretation of the rights of the longshoremen pertaining to the determination when a Memorandum of Informal Conference becomes an award under Section 933(b); it likewise does not have any discussion or statement with respect to the conflict of interest question that we are dealing with here. Since there are political ramifications involved in the passage of the 1972 Amendments, silence in the Congressional Committee Reports pertaining to the contemplation of an important and controversial change in existing law indicates that there has been no change (page 10). The Court also pointed out that Congress repeatedly refused to limit the shipowner's liability

for negligence and the intent was that a longshoreman be free to sue the vessel as heretofore by proving negligence and causation and have his total damages paid by the vessel (page 10-12). It was also pointed out that the Act seeks to protect the longshoreman and if any inequity appears "we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoremen whom the Act seeks to protect" (page 13). The Supreme Court felt that since there was no specific intent to change the Statute in respects material here, whatever rights the parties had at the time just prior to the 1972 Amendment are still applicable.

Edmonds speaks of "an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoremen's rights against the third party unless

the longshoreman sues within six (6) months". The Court also pointed out that "we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in the light of the rules of maritime law that it chose not to change". (page 15) The Court went on to say that should the courts now determine a change in the rights of a longshoreman, that would not be proper, stating: "By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance". (page 16) The Supreme Court also stated that: "Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions

would effectively alter the Statute by causing it to reach different results than Congress envisioned". (page 16) The Supreme Court pointed out that we can only "presume that Congress acted with the existing state of the law, not the probability of future judiciary change in mind".

From the foregoing it is quite clear that the law with respect to assignment, as existed prior to 1972, is applicable today and as existed at the time a formal order is required before the statutory assignment is triggered. The cases decided by the various courts since 1972 have sought to change the rights of the longshoremen and by doing so not only deprive him of his rights that existed prior to the Amendment, but did so contrary to the intent of Congress. Reliance on decisions like Rodriguez, Hernandez, Bandy, Perez and the like is relying

on that which the Supreme Court does not approve of. The Court here should not go far afield to look for reasons to deprive the longshoreman of his rights, for that was not the intent of Congress either.

Furthermore, this Court finds it interesting or compelling to note that in some cases, as in Sessa, the decisions were "premised on outdated administrative practice. Modern practice, as indicated below, authorizes considerable greater delegation of authority than was permissible at the time those cases were decided". The Court has made an error of serious proportions: Firstly, whatever administrative procedure or practice was engaged in at the time of the 1972 Amendments are equally applicable to cases today. Were it otherwise it would contravene the direction of the Supreme Court. Secondly, this Court finds some solace in citing

the regulations and concluding that "whatever may have been the regularity scheme when Sessa was decided, the regulations applicable to this case clearly authorize the Claims Examiner to make an award of compensation based on settlement reached at an informal conference".

Unfortunately, the Court was not made aware of the fact that from 1974 on the Regulations were quite specific as to who may authorize anyone to enter an order. For example, the Federal Regulations 701.301(7) defines the Deputy Commissioner as one being appointed by the Act and states that his designee is to be authorized by the Director to perform functions with respect to processing and determination of claims for compensation. Section 801.1, Subdivision (9), pertaining to the Benefits Review Board defines a Deputy Commissioner again as one appointed by the Act "or his designee

authorized by the Director to make decisions and orders with respect to claims arising under the Acts". Thus, by definition the Regulations have always required the authorization of the Director, not the Deputy Commissioner. Since Section 701-312 stated that the designee shall perform "duties set forth below assigned to Deputy Commissioner", the courts have been interpreting that to mean that the designee could enter an order but that is not correct for two reasons: First, it conflicted with the Regulations pertaining to definitions and presumably the duty referred to pertained to procedure in holding hearings, etc., and not to the entry of orders. By September 9, 1977, the Regulations were changed to clarify this very question and Section 701-312 had added thereto, "except that a compensation order following an agreement shall be issued only by a person so designated

by the Director to perform such duty". That made it consistent with the other Regulations. It also meant that a Claims Examiner did not derive the power to enter an order based on an appointment from the Deputy Commissioner. Second, how does this Court justify a reference to outdated administrative practice when the latest change or clarification in the Regulations continue the restrictions theretofore existent.

The same discussion as above pertaining to the question of conflict of interest also results in the inevitable conclusion that the courts have erroneously placed the burden on the longshoremen rather that on the shipowner to prove conflict.

It is also important to note that the Benefits Review Board has decided that a Claims Examiner does not have the authority to enter an order.

Since this Court is relying on Rodriguez, Hernandez, Bandy and Perez, the Court should be made aware of the fact that these cases are up on appeal. Annexed hereto and made a part hereof is a copy of the Brief of Plaintiff-Appellant in Rodriguez. Please note that it was written before the Edmonds case was decided. Also note that the Edmonds case supports the contents of the Brief and in particular, pages 19 to 22.

The case of Potomac Electric Power Co. v. Wynn, Jr. is the law which was in effect at the time of the 1972 Amendments, to the knowledge of Congress and unchanged by them. The principles set forth therein are equally applicable today and shipowner's burden of proving no conflict of interest has failed. The motion here, therefore, must be denied.

WHEREFORE, plaintiff respectfully requests the foregoing motion for summary judgment be denied with costs.

/s/ MORRIS CIZNER

(Jurat omitted in printing.)

MEMORANDUM OPINION OF HON. MORRIS E. LASKER, U.S.D.J., AUGUST 8, 1979 (Pages 162a to 163a.)

LASKER, D.J.

By Memorandum Opinion dated May 31, 1979, the plaintiff in this action was given forty-five days within which to submit competent evidence establishing a conflict between his interests and those of his employer sufficient to bring his case within the exception to the mandate of 33 U.S.C. §933(b) created in Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956). The defendant was given leave to renew its motion for summary judgment dismissing this action on the grounds that the plaintiff's cause of action has been assigned to his employer pursuant to section 933(b) after forty-five days.

Plaintiff did not submit any evidence within the allotted forty-five days, and the defendant now renews its motion. In opposition, plaintiff still has not

submitted any evidence tending to show that a real conflict of interest exists, but seeks instead to reargue the issues disposed of on defendant's prior motion. Plaintiff is not entitled to a "second bite of the apple," and should address its arguments to the Court of Appeals.

Accordingly, for the reasons stated in our opinion of May 31, 1979 in this case and in our opinion in Perez v. Arya National Shipping Line, Ltd., 468 F. Supp. 799 (S.D.N.Y. 1979), the defendant's motion for summary judgment dismissing this action is granted.

It is so ordered.

Dated: New York, New York
August 8, 1979

MORRIS E. LASKER
U.S.D.J.

OPINION OF HON. MORRIS E. LASKER.

(Printed in the Supplemental Appendix to Petition as Appendix G at Pages 1g to 17g.)